STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 20, 2006
v	No. 260483 Wayne Circuit Court
JOHNZETTA JESSIE, Defendant-Appellant.	LC No. 04-006512-05

Before: Smolenski, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Under a theory of aiding and abetting, defendant was convicted by jury of breaking and entering with the intent to commit larceny, MCL 750.110. Defendant appeals as of right. We affirm.

Defendant first argues that there was insufficient evidence presented to support her conviction. We review sufficiency of the evidence claims de novo to determine whether the evidence, viewed in a light most favorable to the prosecution, would warrant a reasonable juror in finding that all the elements of the charged crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). In doing so, however, we will not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992).

The elements of the offense of breaking and entering with the intent to commit larceny are "(1) the defendant broke into a building, (2) the defendant entered the building, and (3) at the time of the breaking and entering, the defendant intended to commit a larceny therein." *People v Cornell*, 466 Mich 335, 360-361; 646 NW2d 127 (2002). Anyone who intentionally assists someone else in committing a crime is as guilty as the person who directly commits it and can be convicted of those crimes as an aider and abettor. *People v Coomer*, 245 Mich App 206, 223; 627 NW2d 612 (2001). However, "[m]ere presence, even with knowledge that an offense is about to be committed or is being committed, is insufficient to establish that a defendant aided or assisted in the commission of the crime." *People v Norris*, 236 Mich App 411, 419; 600 NW2d 658 (1999). Thus, in addition to establishing that the crime charged was committed by the defendant or some other person, the prosecution, in order to convict a defendant under an aiding and abetting theory, must also establish that the defendant performed acts or gave encouragement that assisted in the commission of the crime, and that the defendant intended the commission of

the crime or had knowledge of the other's intent at the time she gave the aid or encouragement. *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004).

Here, when viewed in a light most favorable to the prosecution, the evidence at trial showed that upon responding to an early morning alarm call at a local party store, Officer Michael Bastianelli and Sergeant Blake Johnson of the Detroit Police Department observed a Saturn automobile parked in front of the store. Bastianelli testified that the store's metal security gate was open, but that there were no lights on in the store, which was clearly closed. In order to investigate the matter further without alerting the occupants of the Saturn to their presence, the officers parked their patrol vehicle and approached the store on foot from a distance of approximately one block. As the officers neared the store they observed three males exit the Saturn and approach the front entrance of the darkened business. The officers then observed one of the males, later identified as Dewayne Binyard, open a glass entry door and enter the store. Immediately thereafter, a second of the men, Daniel McCarter, spotted the officers and exclaimed "we caught, we caught." Bastianelli stated that Binyard, McCarter, and the third man, Phillipe Hicks, then complied with his orders to put their hands on their heads and lie on the ground. According to Bastianelli, defendant was sitting in the driver's seat of the Saturn during the entire incident. Bastianelli further stated that the Saturn was running with its break lights lit and its doors open. Defendant and her three companions, along with a fourth male, Phillip Sirmons, who was later discovered inside the store, were all subsequently arrested.

We conclude that a rational trier of fact could, on the basis of the foregoing evidence, find beyond a reasonable doubt that Binyard broke into and entered the store with the intent to commit a larceny therein, and that defendant assisted in the commission of that crime with the intent or knowledge necessary to support her conviction under a theory of aiding and abetting. See *People v Toole*, 227 Mich App 656, 659; 576 NW2d 441 (1998) ("[u]nder Michigan law, any amount of force used to open a door or window to enter the building, no matter how slight, is sufficient to constitute a breaking"); see also *People v Uhl*, 169 Mich App 217, 220; 425 NW2d 519 (1988) (the intent to commit larceny may reasonably be inferred from the nature, time, and place of a defendant's acts before and during the breaking and entering). Indeed, Bastianelli testified that Binyard, McCarter, and Hicks each got out of a car that defendant had been driving, and that defendant sat in the running vehicle with its doors open and her foot on the brake while each of these men approached and either entered or attempted to enter the obviously closed store. Under such circumstances, it is reasonable to infer that defendant knowingly assisted in the commission of the charged crime by providing transportation to and from the clearly closed and unoccupied store. *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993) (circumstantial evidence and the reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense); *Uhl*, *supra*. Although defendant testified that she had merely complied with McCarter's request that she pull over near the store and did not know of her companions' intent to burglarize the store, it was within the jury's province to reject her testimony in this regard. *Wolfe*, *supra*; *Norris*, *supra*. Consequently, we find that there was sufficient evidence presented to support defendant's aiding and abetting a breaking and entering with the intent to commit larceny conviction. *Moore*, *supra* at 67; *Nowack*, *supra*.

Defendant next argues that the trial court abused its discretion when it denied her motion for a new trial on the ground the jury's verdict was against the great weight of the evidence. We disagree.

"The standard of review applicable to a denial of a motion for a new trial is whether the trial court abused its discretion." *People v Abraham*, 256 Mich App 265, 269; 662 NW2d 836 (2003). We will find an abuse of discretion "only where the denial of the motion was 'manifestly against the clear weight of the evidence.'" *Id*., quoting *People v Ross*, 145 Mich App 483, 494; 378 NW2d 517 (1985). "The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998). In order to discount testimony that supports a verdict and grant a new trial, the testimony must either contradict indisputable physical facts, or be so patently incredible or inherently implausible that a reasonable juror could not believe it. *Id*. at 643-644.

Defendant testified at trial that she was on her way to purchase gas and stopped at the store only because McCarter unexpectedly told her to stop and she saw lights on in the store. She further testified that she did not know why the men that she was with left the car, and that none of these men ever in fact entered the store. We again note, however, that the jury obviously chose not to believe defendant's testimony in this regard, and we must afford deference to the special opportunity and ability of the trier of fact to determine the credibility of the witnesses. *Wolfe*, *supra*. Moreover, as discussed above, the testimony offered by the responding officers was sufficient to support that defendant aided and abetted in a breaking and entering with the intent to commit larceny. The aforementioned testimony supporting defendant's conviction was not contradicted by indisputable physical facts, nor was it so patently incredible or inherently implausible that a reasonable juror could not believe it. Thus, the jury's verdict was not against the great weight of the evidence and a miscarriage of justice will not result by allowing the verdict to stand. *McCray*, *supra*. The trial court did not abuse its discretion when it denied defendant's motion for a new trial. *Lemmon*, *supra*.

Finally defendant argues that she was denied her constitutional right to a fair trial through misconduct of the prosecutor. Again, we disagree.

We review preserved claims of prosecutorial misconduct on a case-by-case basis to determine whether the defendant was denied a fair and impartial trial. *People v Rice (On Remand)*, 235 Mich App 429, 434-435; 597 NW2d 843 (1999). We review unpreserved claims of prosecutorial misconduct for plain error affecting the defendant's substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). In the latter case, reversal is warranted only if plain error caused the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings regardless of the defendant's innocence. *Id*. at 454.

A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *Rice*, *supra* at 438. A prosecutor may not argue facts not in evidence or mischaracterize the evidence presented, but may argue reasonable inferences from the evidence. *People v Watson*, 245 Mich App 572, 588;

629 NW2d 411 (2001). Although a prosecutor also may not ask a defendant to comment on the credibility of prosecution witnesses, he may nonetheless attempt to ascertain which facts are in dispute. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985); *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

As previously noted, in contradiction of Bastianelli's testimony that Binyard entered the store before being apprehended by the police, defendant testified on direction examination that none of the three men that she drove to the store entered the establishment before being apprehended by the police. After the prosecutor confirmed defendant's testimony in this regard during cross-examination, the prosecutor asked defendant, "So, what the cop said or he told was lying?" Without objection, defendant responded that Bastianelli was in fact lying. Defendant is correct that because her opinion whether Bastianelli was telling the truth is not probative of whether defendant committed the charged crime, the prosecutor's questioning in this regard was improper. *Buckey*, *supra*; *Ackerman*, *supra*. However, a timely objection by defense counsel would have cured any prejudice by obtaining a curative instruction. *Buckey*, *supra* at 17-18. Moreover, the trial judge instructed the jury that the attorneys' questions and comments were not to be considered as evidence, and that it was the jury's job to determine the credibility of the witnesses. Thus, as in *Buckey*, *supra*, and *Ackerman*, *supra*, the prosecutor's improper but unchallenged question does not warrant reversal.

Next, we find to lack merit defendant's claim that the prosecution argued facts not in evidence and mischaracterized testimony by asking defendant whether the store was brightly lit and repeatedly inquiring of her relationship with Sirmons. As noted, during her testimony on direct examination defendant stated that one of the reasons she stopped outside the store when asked to by McCarter was that there was a light on inside the store. Given this testimony, we find no misconduct in the prosecutor's subsequent questioning of defendant regarding whether this light caused the store to be "brightly lit." Similarly, regarding defendant's relationship to Sirmons, officer Pamela Walker testified that defendant told her that McCarter had indicated that his brother was in the store, and when Walker asked defendant who Sirmons was, she replied that he was McCarter's brother. Sergeant Johnson also testified that when he viewed defendant, Sirmons and the other suspects' actions in the processing area following their arrest, it appeared that Sirmons and defendant in fact knew each other. Thus, given defendant's testimony on direct examination that she did not know Sirmons, the prosecution did not argue facts that were not in evidence or mischaracterize testimony when he asked defendant about her relationship with Sirmons. *Watson*, *supra*.

Finally, we reject defendant's argument that she was denied a fair trial when asked by the prosecutor whether she was "going to smoke buds someplace." Defendant testified that on the night of her arrest she was out celebrating in her old neighborhood with some friends, and that later in the night she drove to get gas before going home. Defendant stated that on the way to the gas station, McCarter asked her to pull over at the store in question, so she complied. Given the sequence of events, on cross-examination the prosecutor attempted to elicit why defendant took McCarter and the others with her when she allegedly went to get gas before going home. In doing so the prosecutor asked, "[y]ou weren't going to party with him? You weren't going to smoke buds someplace?" Defense counsel objected to the prosecutor's question and his objection was sustained. Although we agree that there was no apparent relevant basis for the latter portion of the prosecutor's question, given the context of the question and the fact that the

trial judge sustained defense counsel's objection to the question and later instructed the jury that the attorneys' questions and comments were not to be considered evidence, we conclude that the prosecutor's question did not deprive defendant of her right to a fair and impartial trial. See *Watson, supra* at 587-588.

Affirmed.

/s/ Michael R. Smolenski
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray